Supreme Court, U.S.
FILED
FEB 10 1993
OFFICE OF THE CLERK

No. 92-903

In the Supreme Court of the United States

OCTOBER TERM, 1992

POSTERS 'N' THINGS, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. 857(a)(1) (1988).

2. Whether petitioner Acty was properly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Hamling v. *United States*, 418 U.S. 87 (1974)	5
Morissette v. *United States*, 342 U.S. 246 (1952)	4
United States v. *Balint*, 258 U.S. 250 (1922)	8
United States v. *Dyer*, 750 F. Supp. 1278 (E.D. Va. 1990)	5, 10
United States v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955 (6th Cir.), cert. denied, 493 U.S. 933 (1989)	8, 9, 10
United States v. *Mishra*, 979 F.2d 301 (3d Cir. 1992)	4, 8, 9, 10
United States v. *Murphy*, 977 F.2d 503 (10th Cir. 1992)	8, 9
United States v. *Schneiderman*, 968 F.2d 1564 (2d Cir. 1992), petition for cert. pending, No. 92-1174	8, 9
Village of Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)	5-6, 7, 8, 9

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	5
Crime Control Act of 1990, Pub. L. No. 101-647, § 2401(b)-(d), 104 Stat. 4859	4
18 U.S.C. 371	2
18 U.S.C. 1956(a)(1)(A)	2
18 U.S.C. 1957	2
18 U.S.C. 841(a)(1)	2, 11

Statutes—Continued: Page

21 U.S.C. 854 2
21 U.S.C. 857 (1988) 4, 5, 6, 7, 8, 9, 10
21 U.S.C. 857(a)(1) (1988) 2, 3
21 U.S.C. 857(d) (1988) 3, 5, 11
21 U.S.C. 857(d)(1)-(15) (1988) 3
21 U.S.C. 857(e) (1988) 3, 5, 11
21 U.S.C. 857(f) (1988) 3
21 U.S.C. 863 (Supp. II 1990) 4
21 U.S.C. 863(a)(1) (Supp. II 1990) 4

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-903

POSTERS 'N' THINGS, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 969 F.2d 652.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. On August 17, 1992, the court of appeals denied a petition for rehearing. Pet. App. A50. The petition for a writ of certiorari was filed on November 16, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioners were convicted on two counts of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. 857(a)(1) (1988). Petitioner Posters 'N' Things, Ltd., was also convicted on one count of conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Lana Christine Acty was convicted on two counts of conspiring to use an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 18 U.S.C. 371; aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); investment of income derived from a drug offense, in violation of 21 U.S.C. 854; money laundering, in violation of 18 U.S.C. 1956(a)(1)(A), and two counts of engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. 1957. Acty was sentenced to 108 months' imprisonment and fined $150,000. Posters 'N' Things, Ltd., was fined $75,000. The court of appeals affirmed. Pet. App. A1-A49.

1. Acty formed Posters 'N' Things, Ltd., in 1977. Posters 'N' Things operated several businesses, including a store named "Forbidden Fruit," which was later renamed "World Wide Imports." Law enforcement officers received complaints that the store was selling drug paraphernalia, and officers working on drug cases found drug paraphernalia and drug diluents (chemicals used to dilute illegal drugs) that had been purchased from Forbidden Fruit. Pet. App. A3-A4.

In March 1990, law enforcement officers executed warrants to search petitioners' business premises and Acty's residence. The officers confiscated business and financial records, drug paraphernalia (including pipes, bongs, roach clips, scales, and cocaine mirrors), cash, drug diluents (including Mannitol, Inositol, and Lidocaine), and catalogs and advertisements describing products sold by petitioners. An advertisement for a product called "PseudoCaine" stated that it was "The Hottest Active Cut In Nation! Its the new cut product everybody who bought Mannitol is now begging for! * * * 'Burns' just like the real thing." Pet. App. A4-A5, A39-A40.

2. In instructing the jury on the elements of the offense of using an interstate conveyance to sell drug paraphernalia, in violation of former Section 857(a)(1), the district court read the statutory definition of "drug paraphernalia," the statutory list of items expressly identified as drug paraphernalia, and the statutory criteria for determining whether an item not specifically listed is "drug paraphernalia."[1] Pet. App. A55-A58. In

---

[1] Section 857(a)(1) provided:

> It is unlawful for any person —
>
> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia[.]
>
> Section 857(d) defined "drug paraphernalia" as
>
> any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act[.]

Section 857(d)(1)-(15) listed 15 specific items that are "drug paraphernalia," including bongs and roach clips. Section 857(e) listed eight criteria that may be considered, "in addition to all other logically relevant factors," in determining whether an item is "drug paraphernalia." Section 857(f) provided exemptions for persons authorized by law to manufacture, possess, or distribute items otherwise covered by the statute and for any item that is traditionally intended for use with tobacco products.

instructing the jury on the statutory definition of drug paraphernalia as any item "primarily intended or designed" for use with illegal drugs, the district court said:

> The term "primarily intended," as used in these instructions, does not relate to the knowledge or intent of any particular person or persons. Rather, it is for you to determine the primarily intended use of any item by considering these instructions and all logically relevant factors.

Pet. App. A59.

3. The court of appeals affirmed. Pet. App. A1-A49. It first upheld the constitutionality of Section 857, rejecting petitioners' claim that the statute was unconstitutional because it lacked a scienter requirement. Pet. App. A12-A26. The court concluded that Section 857 "contain[ed] an *objective* scienter requirement." Pet. App. A13. The court observed that "[t]he omission of subjective scienter language from a statute does not preclude a court from reading such a knowledge requirement into the statute." *Id.* at A16, citing *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). But the court concluded that the statutory definition of drug paraphernalia as including "any equipment, product, or material * * * designed for use" with a controlled substance "establishes unambiguously that the offense contain[ed] an objective scienter" requirement. Pet. App. A19-A20. The court found "nothing in the language of section 857

In 1990, Congress repealed 21 U.S.C. 857 and replaced it with 21 U.S.C. 863 (Supp. II 1990). See Crime Control Act of 1990, Pub. L. No. 101-647, § 2401(b)-(d), 104 Stat. 4859. Section 863 is largely a reenactment of Section 857. But Section 863, unlike Section 857, makes it unlawful "to sell or offer for sale drug paraphernalia." 21 U.S.C. 863(a)(1) (Supp. II 1990). See *United States* v. *Mishra*, 979 F.2d 301, 304 & nn.3-5 (3d Cir. 1992) (describing differences between Sections 857 and 863).

that would require a subjective scienter interpretation." *Id.* at A17. For example, the court pointed out, Congress did not use the word "knowingly" or impose any requirement that items be sold with the "intent" that they be used as drug paraphernalia. *Id.* at A18. The court also noted that Section 857(d) "lists items which Congress evidently determined are intended or designed for illegal purposes by their very nature and irrespective of a defendant's subjective intent." Pet. App. A22, quoting *United States* v. *Dyer*, 750 F. Supp. 1278, 1284 (E.D. Va. 1990). Finally, the court noted that the factors listed in Section 857(e) to be considered in determining whether an item is "drug paraphernalia" were "objective in nature." Pet. App. A22.

The court held that the objective scienter requirement of Section 857 satisfied the requirements of the Due Process Clause of the Fifth Amendment. Pet. App. A23-A26. The court drew an analogy to criminal statutes that prohibit the distribution of obscene materials. In the obscenity context, the court noted, the government is not constitutionally required to prove that the defendant knew the materials were obscene. Instead, it is sufficient if the government proves that the defendant had "knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Pet. App. A26, quoting *Hamling* v. *United States*, 418 U.S. 87, 123 (1974). The court of appeals ruled that the inherent characteristics of an item "primarily intended or designed for use" with controlled substances provide defendants with adequate notice under the Due Process Clause.

The court of appeals also held that Section 857 was not unconstitutionally vague. Pet. App. A26-A33. The court explained that a statute is not facially void for vagueness unless it "is impermissibly vague in all of its application[s]." *Id.* at A29, quoting *Village of Hoffman Estates*

v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). The court ruled that petitioners had failed to make such a showing. The court explained that Section 857 defined a "clear core of prohibited conduct" and contained an objective scienter standard. Pet. App. A30-A31. The court further held that the statute was not unconstitutionally vague as applied to petitioners. The court rejected petitioners' assertion that "the factors in subsection (e) were ignored," finding that the government "repeatedly referred to" the statutory factors "to establish that the items being sold were illegal." *Id.* at A32-A33.

Finally, the court of appeals held that the evidence was sufficient to support Acty's conviction for aiding and abetting the manufacture and sale of cocaine. Pet. App. A37-A40. The court found that the evidence showed that Acty had sold cocaine diluents to at least four cocaine dealers, including Randy Kennedy, whom she was charged with aiding and abetting. The government showed that several of the diluents Acty sold had few or no lawful uses, and one was advertised by Acty as designed and intended for use as a cocaine diluent. The evidence further showed that Acty sold the diluents in amounts that drug dealers, rather than users, would purchase. *Ia.* at A39-A40.[2]

---

[2] The court also rejected Acty's claim that the evidence was insufficient to support her conviction for money laundering. Pet. App. A34-A37. Petitioner does not reassert that claim here. Although the court of appeals agreed with the government that the district court had erred by sentencing Acty to less than the mandatory ten-year term of imprisonment for aiding and abetting the manufacture and distribution of more than 100 kilograms of cocaine, the court declined to require resentencing because the government had failed to make a timely objection to the illegal sentence. *Id.* at A40-A45. The court also upheld the district court's downward departure from the Sentencing Guidelines range. *Id.* at A45-A49.

ARGUMENT

1. Petitioners contend (Pet. 12-21) that the court of appeals' decision conflicts with this Court's decision in *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Contrary to petitioners' contention, *Hoffman Estates* strongly supports the court of appeals' decision.

In *Hoffman Estates*, the Court rejected a pre-enforcement facial challenge to the constitutionality of a local ordinance that made it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." 455 U.S. at 492. The Court held that the "designed for use" standard of liability plainly

> encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.

Id. at 501. See also *id.* at 501 n.19. The Court held that this standard of liability was sufficiently clear to pass constitutional muster. In addition, the Court concluded that the alternative "marketed for use" standard of liability "describes a retailer's intentional display and marketing of merchandise" and thus requires proof of "scienter." *Id.* at 502.

Section 857 refers to items "primarily intended or designed for use" with illegal drugs. As the Court recognized in *Hoffman Estates*, an item "designed for use" with illegal drugs is one that is "principally used with illegal drugs by virtue of its objective features." 455 U.S. at 501. Under the analysis of *Hoffman Estates*, an objec-

tive scienter standard of liability based on the "structural characteristics of an item" is constitutionally permissible. *Ibid.*[3]

2. Petitioners also contend (Pet. 22-23) that the court of appeals' decision conflicts with the decisions in *United States* v. *Murphy*, 977 F.2d 503 (10th Cir. 1992); *United States* v. *Schneiderman*, 968 F.2d 1564, 1567 (2d Cir. 1992), petition for cert. pending, No. 92-1174; and *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir.), cert. denied, 493 U.S. 933 (1989). But in all of those cases—and in another recent decision, *United States* v. *Mishra*, 979 F.2d 301 (3d Cir. 1992)—the courts of appeals construed Section 857 to contain a scienter requirement and rejected constitutional challenges to the statute. Although the courts of appeals have differed somewhat in their descriptions of the scienter requirement, there is no conflict in the circuits on that issue that warrants the attention of this Court.[4]

In *Schneiderman*, the court of appeals concluded that the statutory phrase "primarily intended" referred only to the subjective intent of the person charged with dealing in the proscribed articles, and required the government to prove that the defendant knew that there was a

[3] Even if Section 857 lacked any scienter requirement, it would not necessarily follow that the statute was unconstitutional. As one court of appeals has noted, "criminal law has broadened its scope to include * * * breaches of 'regulatory measures in the exercise of . . . the police power.'" *United States* v. *Mishra*, 979 F.2d 301, 305-306 (3d Cir. 1992), quoting *United States* v. *Balint*, 258 U.S. 250, 252 (1922). Accordingly, the courts have rejected due process challenges to criminal statutes that do not require proof of scienter if they have "a moderate penalty scheme similar to that contemplated by" Section 857. *Mishra*, 979 F.2d at 306.

[4] Although petitioners seek to raise the question whether the statute requires subjective scienter, they did not raise that question in the courts below. See Pet. App. 14a n.2.

"strong probability" that the items would be used in connection with illegal drugs. 968 F.2d at 1567. The court went on to recognize, however, that Section 857 also covered a "second category of items," namely those "designed for use" with illegal drugs. 968 F.2d at 1567. The court explained that under that standard, a product qualified as paraphernalia if it was "principally used with illegal drugs by virtue of its objective features." *Ibid.*, quoting *Hoffman*, 455 U.S. at 501. Accordingly, the Second Circuit held that "[i]f the objective features of an item establish *per se* that it is 'designed for use' with illegal drugs, the scienter element is satisfied." 968 F.2d at 1567. In sum, the Second Circuit agrees with the court of appeals in this case that objective factors are sufficient to meet the statute's scienter requirement. Although the Second Circuit views the objective standard as one of two alternative standards of liability, it nevertheless would have affirmed petitioners' convictions under the objective standard.[5]

In *57,261 Items*, a forfeiture case, the Sixth Circuit stated that Section 857

> requires an intent to distribute the items for drug use. The person to whom the statute is being applied * * * must have knowledge that there is a strong probability that the items will be used in this way. The statute thus creates a *scienter* requirement.

869 F.2d at 957. Although that broad language is in some tension with decisions of other courts of appeals recognizing that objective factors alone may satisfy the scienter requirement, the Sixth Circuit's opinion did not focus on or discuss the statutory phrase "designed for

[5] In *Murphy*, the Tenth Circuit "adopt[ed] the position of" the Second Circuit in *Schneiderman*. 977 F.2d at 505. The Third Circuit's decision in *Mishra* also adopts the Second Circuit's position. See 979 F.2d at 306.

use." Moreover, the Sixth Circuit's application of the scienter requirement to the facts of *57,261 Items* indicates that the objective features of an item may satisfy the scienter requirement. The court noted that government witnesses had testified that certain types of ceramic pipes, cigarette holders, and water pipes were "associated exclusively with the inhalation of drugs," and that "[p]ossession or importation of a large quantity of such items for distribution, in itself, raises an inference of guilty knowledge." 869 F.2d at 958. In addition, the court noted that "[t]he most devastating evidence" of scienter was testimony that the defendant sold "substances known to be used primarily for cutting and diluting cocaine, as well as many other items associated with the use of drugs." *Ibid.* In a subsequent case, the Sixth Circuit may further refine its position in light of the statutory phrase "designed for use" and the decisions of other courts of appeals. Accordingly, any tension between *57,261 Items* and the court of appeals' decision in this case does not warrant immediate review by this Court.[6]

3. a. Petitioners were properly convicted of violating 21 U.S.C. 857 (1988), because the items they transported across state lines were "designed for use" with illegal drugs. Some of the items they transported—such as bongs and roach clips—were specifically identified as

---

[6] As the Third Circuit observed in *Mishra*, the debate over whether Section 857 requires "objective" or "subjective" scienter "suggests that the 'subjective/objective' terminology is not of much assistance in giving content to the statutory language." 979 F.2d at 307 n.9. The defendant's subjective expectations may (and usually must) be inferred from objective factors, such as the use of the item in question. "Where the 'illicit purpose of the manufacturer or designer is embodied in the object itself, that purpose is apparent to all who perceive the object.'" *Id.* at 308, quoting *United States* v. *Dyer*, 750 F. Supp. 1278, 1285 (E. D. Va. 1990).

drug paraphernalia in 21 U.S.C. 857(d). The other items—such as cocaine diluents advertised as such—meet the statutory standards of Section 857(e) for items that are drug paraphernalia.

Petitioners repeatedly contend that the district court identified the items at issue as "per se drug paraphernalia" and removed from the jury the determination whether an item was within the statutory definition of drug paraphernalia. See Pet. 8, 11, 12, 15, 20. That is not so. The district court read the jury the entire statutory definition of "drug paraphernalia" and instructed the jurors that "it is for you to determine the primarily intended use of any item by considering these instructions." Pet. App. A55-A59.

b. The evidence was also sufficient to support Acty's conviction for aiding and abetting drug dealer Randy Kennedy in the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). The government introduced evidence that Acty sold drug diluents to at least four drug dealers, including Kennedy, in quantities that would be used by drug dealers rather than by drug users. Pet. App. A40. Moreover, Acty's advertisement for one of the drug diluents specifically stated that it was intended to be used to "cut" cocaine. *Ibid.* The jury instructions required the jury to find that Acty knew "that the crime of the manufacture or distribution of cocaine was being committed or going to be committed by Randy Kennedy" and that she "knowingly acted in some way for the purpose of aiding the commission of the manufacture or distribution of cocaine by Randy Kennedy." Instruction No. 27, C.A. App. Tab 6. By knowingly providing large quantities of diluents to Kennedy, Acty facilitated Kennedy's drug manufacturing and distributing activities and was therefore properly convicted of aiding and abetting him in that enterprise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

FEBRUARY 1993